

Patricia H. Chalk

OF THE STATE OF HAWAII

XO COMMUNICATIONS, INC. and )  
XO LONG DISTANCE SERVICES, INC. )

Decision and Order No. 19826

### DECISION AND ORDER

I.

By joint application filed on May 7, 2002, XO COMMUNICATIONS, INC. and XO LONG DISTANCE SERVICES, INC. (collectively, Applicants), requested commission approval to transfer ownership and control of XO Communications, Inc. By Decision and Order No. 19490, filed on July 26, 2002, the commission: (1) waived the application of Hawaii Revised Statutes (HRS) § 269-7(a), to the extent applicable; and (2) closed the docket.

Subsequently, by joint motion filed on November 1, 2002, Applicants seek to reopen the instant docket, due to certain changes related to the subject transaction. Applicants request commission action no later than December 10, 2002.

Copies of the joint motion were served on the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy (Consumer Advocate). On November 19, 2002, Applicants responded to the commission's information requests, issued in response to the joint motion.

## II.

### A.

XO Long Distance Services, Inc. (XO Long Distance), fka NEXTLINK Long Distance Services, Inc., is a public utility that holds a commission-issued certificate of authority (COA) to provide intrastate long distance services on a resold basis.<sup>1</sup>

XO Long Distance is a wholly-owned subsidiary of XO Communications, Inc. (XO Communications). In turn, XO Communications, through its subsidiaries, is authorized to provide: (1) intrastate long distance services, virtually nationwide, including Hawaii; and (2) local exchange services in approximately 30 states, not including Hawaii.

XO Communications is currently owned by: (1) Craig McCaw, 51 per cent interest; (2) Forstmann Little & Co. (Forstmann Little), 8 per cent interest; and (3) the remainder by individual shareholders who individually do not hold a voting interest greater than 10 per cent.<sup>2</sup> Accordingly, XO Communications is a second-tier subsidiary corporation, while XO Long Distance is a third-tier subsidiary corporation.

On June 17, 2002, XO Communications filed a petition for bankruptcy with the United States (U.S.) Bankruptcy Court, under Chapter 11 of the U.S. Bankruptcy Code.<sup>3</sup> XO Communications represents that:

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<sup>1</sup>See Decision and Order No. 17493, filed on January 25, 2000, in Docket No. 99-0208. See also letter dated January 22, 2001, from XO Long Distance to the commission (name change).

<sup>2</sup>See Exhibit A, page 1, of the motion.

<sup>3</sup>See letter dated June 20, 2002, filed on June 21, 2002, from counsel for XO Communications; and form letter dated June 24, 2002, filed on July 1, 2002, from XO Communications.

1. It is "seeking temporary protection from claims of creditors while the Company reorganizes its operations and restructures its finances."
2. Its operating subsidiaries, including XO Long Distance, have not filed for bankruptcy protection, and will continue to operate under the same terms and rates.
3. It does not anticipate any disruption of service to its customers, and will conduct business as usual with respect to its operating subsidiaries.

B.

Telmex, a Mexico corporation, is a provider of telecommunications services in Mexico. Forstmann Little is a private equity investment firm located in New York.

C.

The joint application described the subject transaction as follows:

Pursuant to a stock purchase agreement, dated January 15, 2002, Telmex and Forstmann Little will each invest cash in XO Communications, in return for common shares. Following this transaction, the respective ownership interests of XO Communications will be as follows: (1) Telmex, 40 per cent interest; (2) Forstmann Little, 40 per cent interest; (3) 18 per cent interest by individual shareholders, including Craig McCaw, who individually will not hold a voting interest greater than 10 per cent; and (4) the remaining 2 per cent by management interests.<sup>4</sup> Upon the closing of the transaction, XO Long Distance will continue as a third-tier subsidiary corporation.

By Decision and Order No. 19490, the commission waived HRS § 269-7(a), to the extent applicable, with respect to the subject transaction (Telmex/Forstmann Little transaction).

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<sup>4</sup>See Exhibit 2, page 2, of the joint application.

D.

In their joint motion, Applicants explain that the Telmex/Forstmann Little transaction will not be implemented. Thus, neither Telmex nor Forstmann Little will obtain any interests in XO Communications, Inc. Instead, the reorganization of XO Communications, Inc. will take place under an alternative transaction.<sup>5</sup>

Pursuant to the alternative transaction, XO Communications, Inc. will undergo reorganization. As a result thereof, the ownership interests of XO Communications, Inc. will be as follows: (1) High River Limited Partnership, 80 per cent; (2) Meadow Walk Limited Partnership, 1.4 per cent; and (3) the remaining 18.6 per cent by other shareholders, none of which are expected to hold a 10 per cent or more interest.

The alternative transaction will involve the elimination of unsecured debt, conversion of existing loans into common stock, and the issuance of new equity. In addition, the reorganized XO Communications, Inc.: (1) will seek additional funds through a \$200 million rights offering; and (2) may borrow up to an additional \$200 million.

Following the limited partnerships acquisition of XO Communications, Inc.'s stock, "they may distribute such stock so that it will be held by Cardiff Holding LLC."

The limited partnerships and limited liability company are entities that are ultimately controlled by Carl C. Icahn, a U.S. citizen.

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<sup>5</sup>Applicants and the U.S. Bankruptcy Court refer to the alternative transaction as the Stand-Alone Plan.

### III.

#### A.

In essence, Applicants seek: (1) to reopen the instant docket; (2) to rescind Decision and Order No. 19490; and (3) the issuance of a new decision and order, addressing the alternative transaction.

At the time of the filing of their joint motion, Applicants expressed optimism for the U.S. Bankruptcy Court's approval of the alternative transaction. Thereafter, by its November 19<sup>th</sup> filing, Applicants transmitted a copy of the Court's order approving the alternative transaction.<sup>6</sup> Applicants intend to close the alternative transaction soon after receiving the Court's approval. Given this recent approval, Applicants represent that XO Communications, Inc.'s emergence from bankruptcy is imminent.

Upon review, the commission finds good cause to reopen the instant docket.

#### B.

HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

HRS § 269-16.9(e) authorizes the commission to waive regulatory requirements applicable to telecommunications

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<sup>6</sup>On November 15, 2002, the Court: (1) held a confirmation hearing on the Stand-Alone Plan; and (2) issued its written order approving this Plan. See footnote 5, supra.

providers if the commission determines that competition will serve the same purpose as public interest regulation. Similarly, HAR § 6-80-135 authorizes the commission to exempt or waive a telecommunications carrier or services from the provisions of HRS chapter 269 or any other telecommunications rules, upon a determination that the exemption or waiver is in the public interest.

C.

The alternative transaction involves the: (1) transfer of ownership and control; and (2) subsequent restructuring of various entities at the first-tier level. Upon review, the commission believes that HRS § 269-7(a) applies to the alternative transaction. Nonetheless, the commission finds that the alternative transaction is consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Of particular note:

1. Following the transaction, XO Communications will continue to retain ownership and operating authority of XO Long Distance.
2. XO Long Distance will continue to provide intrastate long distance service under the same name, tariff, and rates.
3. Applicants, thus, state that the transaction will be transparent to its Hawaii-based customers.
4. Applicants represent that the reorganized XO Communications, Inc. "will benefit from a major reduction in its current debt load as well as potential additional funding through the rights offering or the additional \$200 million loan[.]"
5. Applicants further state that the reorganized XO Communications, Inc. "is expected to have \$387 million in cash or cash equivalents available to it."

Based on the foregoing reasons, the commission, on its own motion, will waive the requirements of HRS § 269-7(a), to the extent applicable, pursuant to HRS § 269-16.9(e) and Hawaii Administrative Rules § 6-80-135.<sup>7</sup>

XO Long Distance's current tariff on file with the commission, dated January 22, 2001, took effect on January 30, 2001. The Consumer Advocate, as part of its review of the joint application, recommended that XO Long Distance revise its tariff in accordance with the commission's Decision and Order No. 17493.<sup>8</sup> To the extent its tariff is inconsistent with Decision and Order No. 17493, XO Long Distance shall promptly file its revised tariff sheets with the commission, and serve two copies upon the Consumer Advocate.

#### IV.

##### THE COMMISSION ORDERS:

1. HRS § 269-7(a), to the extent applicable, is waived with respect to the alternative transaction described in the joint motion, filed on November 1, 2002.

2. Decision and Order No. 19490, filed on July 26, 2002, is rescinded.

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<sup>7</sup>At the same time, the commission will continue to examine a utility's application on a case-by-case basis to determine whether the applicable requirements of HRS § 269-7(a), or any other related provision governing utility transactions, should be waived. The commission's waiver in this decision and order shall not be construed by any utility as a basis for not filing an application involving similar transactions or circumstances.

<sup>8</sup>This decision and order, filed on January 25, 2000, granted a COA to XO Long Distance Services, Inc.'s predecessor-in-interest.

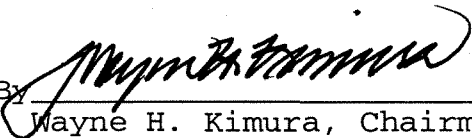


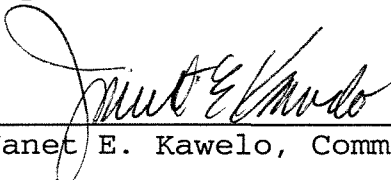
3. To the extent its tariff is inconsistent with Decision and Order No. 17493, XO Long Distance Services, Inc. shall promptly file its revised tariff sheets with the commission, and serve two copies upon the Division of Consumer Advocacy.

4. This docket is closed.

DONE at Honolulu, Hawaii this 27th day of November, 2002.


PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Wayne H. Kimura, Chairman

By   
Janet E. Kawelo, Commissioner

By \_\_\_\_\_ (RECUSED)  
Gregg J. Kinkley, Commissioner

APPROVED AS TO FORM:

  
Michael Azama  
Commission Counsel

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CERTIFICATE OF SERVICE


I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 19826 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: November 27, 2002